

IN THE UNITED STATES DISTRICT COURT
 FOR THE EASTERN DISTRICT OF VIRGINIA
 RICHMOND DIVISION

LULA WILLIAMS, et al., on behalf	:	
of themselves and all individuals	:	Civil Action No.
similarly situated	:	3:17CV461
vs.	:	
BIG PICTURE LOANS, LLC, et al.	:	
	:	
RENEE GALLOWAY, et al., as	:	
individuals and as representatives	:	Civil Action No.
of the class	:	3:18CV406
vs.	:	
BIG PICTURE LOANS, LLC, et al.	:	
	:	
JOETTE PETE	:	Civil Action No.
vs.	:	3:19MC26
BIG PICTURE LOANS, LLC, et al.	:	
	:	

JUNE 5, 2020

COMPLETE TRANSCRIPT OF THE CONFERENCE CALL

BEFORE THE HONORABLE ROBERT E. PAYNE

UNITED STATES DISTRICT JUDGE

APPEARANCES:

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 Official Court Reporter
 United States District Court

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1 questioning and for expedited ruling, ECF number 747.

2 Mr. Erbach and Ms. Alamo, if you want two different
3 things in relief, you file separate motions. I'm dismissing
4 without prejudice the motions to dismiss that were filed with
5 the -- I'm leaving the motion intact, but I'm denying --
6 dismissing and striking the memorandum because they are two
7 different tests that are involved, and I've given you leave to
8 re-file it. I don't know if that's been filed yet, but you
9 need to re-file it Monday, and I don't want anymore of it.

10 I thought I mentioned it several times before, but it
11 could be in another case, so I'm not going to fuss about it. I
12 just don't want it anymore in this case.

13 When you do that, even when you do it, you have to
14 file it twice anyway under the ECF system, but that's not my
15 problem. My problem is the analytical issues are somewhat
16 different. In this case, they are about the same, but I've
17 read the deposition testimony, and let me give you some
18 guidance.

19 It seems to me that the general rule is that you do
20 not instruct a witness not to answer a question. What you do
21 is put the question on the record with the understanding that
22 the witness is not going to answer the question, and the
23 lawyers agreed to do that, and they say, all right, Joe Smith
24 is handling the examination, ask your question, and then these
25 objections obtain for all of the questions. Then you get the

1 transcript typed up or you call the Court, and all at one time
2 you get a ruling.

3 Now, it looks to me like from reading the transcript
4 that Mr. Scheff didn't do that at the beginning but that he
5 later realized what was going on and did try to do it. And
6 so -- and I'd like to know whether the transcript now contains,
7 and the memorandum supporting the motion, all of the questions
8 on which I need to rule. That's the first question. Mr.
9 Erbach, Ms. Alamo?

10 MR. ERBACH: Your Honor, the transcript contains, I
11 think, three specific questions that Mr. Scheff asked about
12 three specific individuals, and then there was a follow-up
13 question where he asked a broader question indicating that he
14 was asking if the witness would answer questions about any
15 other reports to the FBI about anyone else, and she indicated
16 that she would not.

17 THE COURT: Is this Mr. Erbach?

18 MR. ERBACH: Yes, Your Honor, this is John Erbach.

19 THE COURT: So everything is in the papers then; is
20 that right?

21 MR. ERBACH: Ms. Alamo --

22 THE COURT: That's all I need to know. Every
23 question is in the papers; is that right?

24 MS. ALAMO: All of the questions that Mr. Scheff was
25 basically permitted or had the opportunity to ask on the record

1 should be in the papers, yes. I don't have the papers in front
2 of me. The issue is because Ms. Pete would not answer even
3 yes-or-no questions that were posed to her, had she properly
4 answered the questions, there likely would have been follow-up
5 questions.

6 THE COURT: I understand that.

7 MS. ALAMO: Okay. Yes, I believe the starting
8 questions are in the papers.

9 THE COURT: All right. Now, was this deposition
10 taken remotely?

11 MS. ALAMO: Yes, Your Honor.

12 THE COURT: Then it seems to me that the proper
13 procedure here is to -- first, I don't know what relevance
14 there is to asking about any reports she's made to people other
15 than Williams and -- what's the other person's name who is the
16 tribal leader?

17 MR. ERBACH: Ms. Hazen.

18 THE COURT: Hazen. And with respect to Martorello.
19 But if she's done or said something with respect to Martorello
20 and to a lesser extent Hazen and Williams, it seems to me to be
21 appropriate grounds for inquiry even though my guess is that
22 the ruling -- if it's offered for relevance, the ruling -- if
23 it's offered probably will not pass the relevance test, but
24 that's not a decision that is made now.

25 So I don't know why we don't go back in the process

1 of establishing a complete record about what it is -- questions
2 you want asked, and then I'll rule on whether or not she has to
3 answer them. The only ground asserted that I see in the papers
4 is, A, lack of relevance which ordinarily in a deposition,
5 objections as to relevance are reserved for later decision, and
6 all objections generally are preserved except to the form of
7 the question and the form -- and the responsiveness of the
8 answer.

9 And then as to privilege, when a question is asked
10 that contains a privilege, the privilege is interposed and then
11 you move on and ask the questions and you move on and then you
12 have a complete record. You submit that with briefing to the
13 judge. That's ordinarily the way it was done.

14 I don't know how you got into such hostilities about
15 this, and I don't like that, and I don't think it's the way
16 that lawyers ought to do things. And all it does is make it
17 more difficult for me to make decisions. So given that the
18 questions that have precipitated the motion are set out in the
19 briefing, then when is the soonest you can make a response,
20 file your response, because they want to expedite it. This was
21 filed on June 3rd. Today is the 5th. I guess it was filed
22 late in the day on the 3rd if I remember correctly. When can
23 you respond, Mr. Bennett?

24 MR. BENNETT: Judge, we'd like to be able to respond
25 on the 11th.

1 THE COURT: That's too long. The hearing is on the
2 22nd, and they need to get the transcript and everything.

3 MR. BENNETT: Then the 10th, please, Judge.

4 THE COURT: How -- what's Tuesday?

5 MR. BENNETT: The 10th, I believe.

6 THE COURT: No, Tuesday is the 9th. You file your
7 response on the evening of Tuesday, the 9th, and you file your
8 reply the morning of the 11th. So that will be the schedule.
9 But, you know, frankly, it seems to me that the simpler way to
10 go about all this is just let Ms. Pete get on the witness stand
11 again and ask the questions with the understanding that there's
12 not going to be any answer and assert the privilege that you
13 are asserting as it applies to everything, or privileges, or a
14 basis for objection, and if it applies to every one of the
15 questions, then so be it. You don't have to make it but once.

16 Another way to go about this is for Mr. Martorello's
17 counsel to submit written questions, and we can go about it
18 that way. Do you all have any idea which way would best suit
19 you?

20 MR. BENNETT: Your Honor, this is the plaintiff. We
21 had discussed at the deposition having an *in camera* attorney
22 eyes only examination on those questions or having the Court
23 supervise the examination on those questions.

24 MS. ALAMO: Your Honor, I'm not sure Mr. Bennett's
25 suggestion gets us where we need to be. I'm sure we could

1 probably put together a list of written questions and submit
2 them with our motion that we're re-filing on Monday.

3 THE COURT: You don't have to re-file this one on
4 Monday. The one you have to re-file is the motion to dismiss,
5 the new motion to dismiss. Is that in Galloway?

6 MS. ALAMO: I'm sorry.

7 THE COURT: That's my fault, Ms. Alamo, because I
8 conflated a discussion in one case with the discussion in all
9 these cases. You don't have to re-file anything in this case.

10 MS. ALAMO: It's the motion to dismiss we re-file on
11 Monday, okay.

12 THE COURT: I think that's in Galloway, I believe.

13 MS. ALAMO: Correct.

14 THE COURT: Is that right, Ms. Tashima?

15 THE LAW CLERK: I believe so.

16 THE COURT: The motions to dismiss that were just
17 filed were filed in Galloway? Mr. Erbach?

18 MR. ERBACH: Just for clarification, and I think I
19 understand what your point is and it's well-taken, there were
20 two separate motions but only a single brief. You're asking us
21 to file separate briefs on the separate standards for the
22 Galloway 1 motions to dismiss; am I correct?

23 THE COURT: That's correct. The analytical structure
24 is different, and I want them dealt with differently,
25 separately. They're entirely different, and, in some

1 instances, they can be the same, they can be related, but each
2 motion stands on its own with its own legal theory and its own
3 jurisprudence, and I'd like, please, to have them done that
4 way.

5 As to what you filed in this matter, Ms. Alamo, you
6 don't have to re-file anything. It occurs to me that Mr.
7 Scheff was in the right direction here after he got started.
8 He was off base to start with, and, frankly, Ms. Alamo, it
9 looks to me like he's also have gone over to the Division of
10 Game and Fisheries and gotten a license for some of the stuff
11 he was going for. In other words, he was fishing around, and
12 I've done that myself, so I don't fault him. But let's confine
13 it to things that have to do with this case.

14 MR. BENNETT: Judge, this is Len Bennett. Ms. Drake
15 has got significant criminal procedure experience in her
16 previous life and notes to me in a direct message that the
17 informant of privilege, because these questions all pertain to
18 what have you told the FBI and who did you tell them about and
19 that that privilege requires that the FBI be put on notice so
20 that if it wants to assert the privilege, it can assert that
21 privilege. I don't know how that works because I don't have
22 those chops and the background in that, but that might be a
23 concern.

24 THE COURT: Well, Ms. Drake anticipated where I was
25 going to go next. After you have the written questions, if the

1 objection to questions is the informant privilege, my
2 recollection is that Ms. Drake is correct and that you notify
3 the FBI, and then if they want to interpose the privilege, they
4 can.

5 So that was the next thing I was going to suggest
6 that you do, and you do that right away. Have they been
7 notified yet?

8 MR. BENNETT: Not by us, Judge. This is Len Bennett.
9 Not by us.

10 THE COURT: Of course they aren't going to be very --
11 until they know exactly what it is that's being asked, they're
12 only going to have part of the deck to play with. So it seems
13 to me then that perhaps the right thing to do is to change this
14 briefing schedule a little bit and have the plaintiffs -- I
15 mean Mr. Martorello file in each of these cases the written
16 questions that he wants answered, and then you file -- and then
17 file -- notify the appropriate federal agency. I think -- do
18 we know what office of the FBI was involved in discussions?
19 Does anybody know that?

20 MR. PATTNI: Your Honor, this is Bhupesh Pattni on
21 behalf of Ms. Pete. I believe it was whatever office that's in
22 Michigan, but I don't know the exact specifics.

23 THE COURT: I think you need to find out, and you --
24 do you know where in Michigan, what district?

25 MR. PATTNI: I could find that information out from

1 my client, Your Honor. Thank you.

2 THE COURT: And let them know, let everybody know,
3 and then you serve the FBI with the document as well, Ms.
4 Alamo. And I guess the best thing to do is to let you file a
5 supplement to number 747 consisting of the questions that you
6 want to have answered, and then you file your objections to
7 them, and you file those on the 11th, Mr. Bennett. And then
8 certify that you have sent this to the United States attorney
9 for whatever district of Michigan and to the FBI special agent
10 in charge of whatever office it is that's involved, and as part
11 of the order I'm going to enter, I will have them file their
12 response on June -- what is the 17th?

13 MS. ALAMO: I believe that's a Wednesday, Your Honor.

14 THE COURT: File it on June 17th. And then any
15 replies that need to be filed can be filed on June 20th. Then
16 we'll decide the matter then. That seems to me to be what's
17 appropriate under the circumstances.

18 Ms. Alamo, my suggestion is that you take a good
19 careful look and just narrow the questions to the things -- to
20 the people that are involved in this case. I can understand
21 your argument about any complaint against Mr. Martorello. That
22 conceivably could go to whether she's biased against him, for
23 instance if she made a complaint that he had threatened her,
24 she made a complaint he had cheated her.

25 It's more attenuated when you talk about Williams and

1 Hazen, but, nonetheless, I can understand how you might have
2 the grounds for going into that even with my limited knowledge
3 of the case.

4 Once you get into who else did you ever talk to the
5 FBI about, it gets pretty far afield, and you're going to have
6 some trouble getting that done. So it's better if you are just
7 more careful with it. Do you all understand what's to be done?

8 MR. ERBACH: Yes, Your Honor.

9 MS. ALAMO: Yes, Your Honor.

10 THE COURT: And the timetable it's to be done on?

11 MS. ALAMO: Your Honor, just to clarify, so we are
12 supplementing with our questions on Monday, the 8th, if I have
13 that right.

14 THE COURT: That's correct.

15 MS. ALAMO: Thank you.

16 THE COURT: Mr. Bennett files his objection and his
17 response to your opening brief on the 11th, and on the date
18 that you file your questions, file -- send a copy of everything
19 to the U.S. Attorney for whatever district in Michigan it is
20 along with instructions that this is the schedule we're going
21 to be following, and send it to the FBI special agent in charge
22 of that district of -- whoever is talking to her. I don't know
23 how they're broken down out there.

24 MS. ALAMO: Yes, Your Honor.

25 THE COURT: What date are your replies due? The U.S.

1 Attorney -- the United States is to file its response on the
2 17th; is that right?

3 MS. ALAMO: That's correct, that's what I wrote down,
4 with replies due on the 20th.

5 THE COURT: That's correct. Thank you all for being
6 available on short notice. I know it was an imposition, but I
7 figure it's better to kind of get this thing on the right track
8 now before you all waste a terrible amount of time and money
9 going down a road that may not be the best way to go. Thank
10 you very much.

11 MS. ALAMO: Thank you, Your Honor.

12 UNIDENTIFIED SPEAKER: Thank you, Your Honor.

13 MR. BENNETT: Thanks, Judge.

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15
16 (End of proceedings.)
17
18

19 I certify that the foregoing is a correct transcript
20 from the record of proceedings in the above-entitled matter.
21
22

23 /s/
24 P. E. Peterson, RPR

Date